No. 93-595

In The Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et. al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT BRIEF IN OPPOSITION OF THE STATE PUBLIC UTILITY COMMISSIONS AND CONSUMER ADVOCATE OFFICES

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December 17, 1993

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QUESTIONS PRESENTED

1. Whether the Third Circuit's choice of law analysis addressing the application of the Bankruptcy Code and the Natural Gas Act to a bankrupt interstate natural gas pipeline is consistent with the decisions of this Court and other circuits?

2. Whether the Third Circuit's application of federal common law to the case before it created important and unresolved problems which would warrant this Court's review?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App., 1a) contains the names of the parties. All of the State Public Utility Commission and Consumer Advocates joining in this cross-petition are governmental agencies and accordingly do not have parent companies or subsidiaries.

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No. 93-695

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OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
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JOINT BRIEF IN OPPOSITION OF THE STATE PUBLIC UTILITY COMMISSIONS AND CONSUMER ADVOCATE OFFICES

Joint Respondents, the Pennsylvania Public Utility Commission, Maryland Office of Peoples' Counsel, Pennsylvania Office of Consumer Advocate, Public Utilities Commission of Ohio, Office of Consumers Counsel, State of Ohio, Public Service Commission of the State of New York, Maryland Public Service Commission and Consumer Advocate Division, Public Service Commission of West Virginia (collectively referred to as the "State Agencies") file this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed by the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation (petitioner or Creditors' Committee) in the above-captioned matter.

OPINION BELOW

The opinion of the court of appeals (Pet. App., 1a-74a) is reported at 997 F.2d 1034. The opinion of the district court (Pet. App., 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App., 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The statement of jurisdiction on page 2 of the petition is adopted. This brief in opposition is filed pursuant to Supreme Court Rule No. 15.2.

STATUTES INVOLVED

The citations of the statutes involved are listed below. The text of the statutes is included in the appendix to the State Agencies' cross-petition filed at 93-879.

Section 1 of the Natural Gas Act, 15 U.S.C. §717(a)
Section 4 of the Natural Gas Act, 15 U.S.C. §717c(a) and (e)
Section 541 of the Bankruptcy Code, 11 U.S.C. §541

STATEMENT OF THE CASE

1. *Bankruptcy Background.* On July 31, 1991, the Columbia Gas System, Inc. and its wholly-owned subsidiary, Columbia Gas Transmission Corporation (Columbia) filed voluntary petitions under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Columbia Gas System, Inc. is a registered public utility holding company which owns and operates natural gas pipelines, natural gas producing companies and natural gas local distribution companies. Columbia is a major natural gas pipeline owned by Columbia Gas System, Inc. which provides natural gas sales and transportation services to customers in parts of eleven states and the District of Columbia. Columbia filed for bankruptcy relief primarily to address financial problems relating to high cost gas purchase contracts between Columbia and numerous gas producers, which had impeded Columbia's ability to sell gas to its gas distribution company customers including its own affiliates.

2. *Regulatory Background.* The refunds at issue here are a direct result of procedures established by the Natural Gas Act, 15 U.S.C. §717, *et seq.*, and utilized by the Federal Energy Regulatory Commission (FERC) to carry out the statutory mandate of ensuring that the gas consuming public pay only just and reasonable rates for natural gas. Section 4 of the Natural Gas Act, 15 U.S.C. §717c(e), sets out in great detail the process which the FERC must follow to approve the rates charged by interstate pipeline companies to their gas distribution customers. These statutory requirements set out a hearing process for FERC and interested parties to review rates filed by a pipeline company.

Section 717c(e) and FERC regulations and orders implementing the statute establish a regulatory system under which FERC routinely permits an interstate pipeline company's preliminary rates to go into effect and be initially charged to its gas distribution customers "subject to refund." After FERC's completion of its investigation, FERC routinely orders refunds, with interest, of any portion of a rate or charge which it determines to be unjust and unreasonable pursuant to its statutory mandate. 15 U.S.C. §717c(e).[1] As to Columbia, refunds ordered by FERC may result either from overcharges by upstream pipelines which must be flowed downstream, ultimately to gas consumers, or may result from overcharges by Columbia in its base rates.

A pipeline's preliminary rates authorized by FERC to become effective "subject to refund," are preliminary rates

[1] "[FERC is directed] upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." 15 U.S.C. §717c(e).

and cannot be considered just and reasonable rates. It is only after FERC hearing and investigation and the routine ordering of refunds that a just and reasonable rate results. Any rate ultimately charged by a pipeline other than the "just and reasonable" rate is unlawful. 15 U.S.C. §717c(a). The FERC is only permitted to order refunds to cure unjust and unreasonable rates to the benefit of those who initially paid the rates, the gas consuming public. *Texas Eastern Transmission Corporation v. Federal Power Commission,* 414 F.2d 344 (5th Cir. 1968).

As to refunds passing downstream from upstream pipelines, when a pipeline receives any FERC ordered refund dollars, the pipeline must file tariff sheets with FERC to pass the refund dollars to its customers. Upon review of the tariff sheets, FERC approves or modifies the pipeline proposal and expressly orders the pipeline to "flow through" the refunds downstream. In its daily implementation of the Natural Gas Act, FERC has directed pipelines to "flow through" refunds on thousands of occasions.

Until such time as a pipeline complies with the FERC order and flows through the refunds, it must review, hold and account for the refunds consistent with the express and very specific requirements of the Natural Gas Act and FERC regulations, 18 C.F.R. Part 201. While, in some cases there are service contracts governing transactions between a pipeline and its upstream suppliers and downstream customers, the contracts must follow form service contracts approved by FERC, which contracts do not even mention refunds or the procedures for receiving, holding and accounting for the refunds. The only contractual provision which relates to refunds expressly obligates the contracting parties to comply with federal law, FERC regulations, FERC orders and FERC tariffs.

Once a pipeline complies with FERC orders and passes the refunds downstream to gas distribution customers the refunds fall within the province of state regulators, including public utility commissions joining in this brief, which monitor the flow through of the refunds to the ultimate beneficiaries, the gas consuming public. The regulation of the final steps of assuring just and reasonable rates to the public at the state level is equally applicable to gas distribution companies affiliated with upstream pipelines as it is to non-affiliated distribution companies.[2]

The regulatory procedures described above were and are directly applicable to the refunds which have been or will be received by Columbia. As to the refunds received pre-bankruptcy, in every case Columbia filed tariff sheets to pass the refunds downstream and in each case, was ordered by FERC to "flow through" the refunds, with interest, to its downstream gas distribution companies.[3]

3. *Proceedings below.* In *Associated Gas Distributors v. Federal Energy Regulatory Commission,* 893 F.2d 349 (D.C. Circuit 1989), *cert denied,* 111 S.Ct. 277 (1990), the District of Columbia Circuit revised the methodology for

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[2]There is no significance to the fact that some of the gas distribution companies which receive the refunds from Columbia are affiliated with Columbia. All gas distribution companies, regardless of their affiliation, are strictly regulated in their receipt and accounting for of the refunds and the pass through of the refunds to the gas consuming public by state regulators.

[3]*See,* for example, *Columbia Gas Transmission Corporation,* 54 FERC 61,003 (January 4, 1991); *Columbia Gas Transmission Corporation,* 54 FERC 61,265 (March 8, 1991); *Columbia Gas Transmission Corporation,* 55 FERC 61,203 (May 9, 1991); *Columbia Gas Transmission Corporation,* 56 FERC 61,080 (July 19, 1991); *Columbia Gas Transmission Corporation,* 56 FERC 61,157 (July 26, 1991); *Columbia Gas Transmission Corporation,* 57 FERC 61,040 (October 8, 1991).

allocating costs related to "take or pay" contracts applicable to all of the natural gas industry (Pet. App., 127a). As applied to Columbia, the implementation of the D.C. Circuit's decision through the issuance of FERC order No. 528 resulted in millions of dollars of overcharges to gas consumers served by Columbia. These overcharges originated with suppliers upstream from Columbia. Through many administrative orders, FERC implemented the D.C. Circuit decision and in doing so, cured unjust and unreasonable rates by ordering refunds under procedures governed by 15 U.S.C. §717c(e) as described above. These refunds constitute the majority of refunds at issue here.

On August 23, 1991, Columbia filed a motion with the bankruptcy court seeking permission to flow through the refunds to gas distribution customers to comply with FERC orders and FERC tariffs. In support of its motion, Columbia claimed that it did not have an equitable interest in the refunds.[4] The total refund obligation addressed by Columbia was approximately $160 million, of which approximately $21 million was received by Columbia pre-bankruptcy, the balance to be received post-petition.

The bankruptcy court granted Columbia's motion and held that applying federal common law, the refunds were held by Columbia in trust for its customers (Pet. App., 134a-136a). The district court reversed the bankruptcy

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[4]Contrary to the representation on page 5 of the petition, property which is expressly exempted from becoming part of the bankruptcy estate is not restricted to trust money but applies to any money for which the debtor does not hold an equitable interest. Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d). This distinction is significant. *T&B Scottsdale Contractors v. United States*, 866 F.2d 1172 (11th Cir. 1989) citing H.R. Rep. No. 595, 95th Cong., 2nd Sess. (1977).

court and applied state law to reach its conclusion that the refunds were part of the bankrupt estate (Pet. App., 101a-104a).

The Third Circuit reversed the district court and after expressly discussing and applying this Court's precedent, held that under federal common law the refunds are not part of the bankrupt estate under 11 U.S.C. §541(d) (Pet. App., 63a). The Third Circuit concluded that all of the refunds received by Columbia after its bankruptcy filing should be passed on to Columbia's gas distribution customers without delay. The Third Circuit did apply the lowest intermediate balance test and concluded that pass through of the approximate $21 million in refunds and other trust funds received by Columbia pre-petition was restricted to Columbia's cash on hand at the time of bankruptcy (Pet. App., 67a). The State Agencies support the Third Circuit's decision to permit the pass through of the majority of the refunds at issue and dispute the decision to restrict the pass through of refunds received by Columbia prior to bankruptcy.[5]

In a separate opinion, Circuit Judge Nygaard concurred with the majority that the refunds were not part of the bankruptcy estate. However, the separate opinion dissented to the majority's application of the lowest intermediate balance test (Pet. App., 69a-74a).[6] As fully explained in its joint cross-petition for certiorari, the State Agencies wholly support the result and rationale advanced by Circuit Judge Nygaard.

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[5]On December 3, 1993, the State Agencies submitted a joint cross-petition for a writ of certiorari which was docketed by this Court at 63-879.

[6]Although as indicated on page 7 of the petition the Third Circuit's decision was reached by a divided panel, not one member of the panel supported the views or the result argued by the petitioner.

The United States government, through FERC, participated before the court of appeals as an *amicus curiae.* FERC made it clear that it had never intended that Columbia hold an equitable interest in FERC ordered "flow through" refunds (FERC brief, page 29). As FERC solicitor Jerome M. Feit recognized at oral argument before the court of appeals, FERC's position should come as no surprise to the participating producers, pipelines, distribution companies, and state agencies, alike. As Mr. Feit correctly stated, everyone in the industry knew that these refunds were held in trust by pipelines (Trans. of oral argument, page 27).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Third Circuit's Choice of Law Analysis is Consistent With the Precedent established by this Court and Other Circuits.

The petition primarily bases its case for certiorari on an argument that the Third Circuit's choice of law analysis is inconsistent with the precedent established by this Court and cases decided by other circuits. The petitioner contends that certiorari should be granted for the following two reasons: (1) the Third Circuit's holding represents an unprecedented application of federal law to all cases involving interpretation of Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d), and (2) the Third Circuit's decision applies federal common law and in doing so, fails to adopt state law trust principles as adopted by other circuits. As discussed below, both of these arguments lack merit. In fact, there is no disagreement among circuits regarding the choice between application of state or federal law to the facts of this case.

I.

The first reason promoted by the petitioner relates to a single sentence in the Third Circuit decision wherein the Court stated, "Therefore, it is clear, and the parties do not dispute, that federal law defines the parameters of section 541(d) of the Bankruptcy Code" (Pet. App., 47a). The petitioner asserts that this statement by the Court is not only inconsistent with the holdings of other circuits, but also is inconsistent with prior decisions of this Court. However, close review reveals that the Court's statement is correct and that no such inconsistency exists.

A federal court's choice between state and federal law has been consistently held to be governed by a two-prong test. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States v. Little Lake Misere Land Company, Inc.*, 412 U.S. 580 (1973); *Clearfield Trust Co. v. United States*, 378 U.S. 363 (1943). First, a court must determine whether the court has authority to apply federal law, or in the alternative, whether state law operates "of its own force." *Kimbell Foods* at 727. *Little Lake Misere* at 593. It is long been established that state law operates "of its own force" only in cases governed by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which does not apply to matters which "arise in the context of a specific [federal] constitutional or statutory provision." *Little Lake Misere* at 592; *Kamen v. Kemper Financial Services, Inc.*, 111 S.Ct. 1711, 1717 (1991). These matters governed by federal law include disputes which relate to a nationwide federal program. *Kimbell Foods* at 726; *Little Lake Misere* at 593. That the federal statute does not specify the appropriate rule or decision in no way limits the use of federal law. Overall, federal courts are "to fill the interstices of federal legislation 'according to their own standards.'" *Kimbell Foods* quoting *Clearfield* at 367.

As will be discussed subsequently, if a court determines that a case is subject to federal law, it must then determine under the second prong whether state law should be adopted as the federal rule or whether federal common law should be established. *West Virginia v. United States,* 479 U.S. 305, 310 (1987); *Kamen* at 1717; *Kimbell Foods* at 727-728. Accordingly, consideration of the second prong substantively determines the choice of law issue between state and federal common law. If a court incorporates state law as the federal rule, the result is the same as if state law were applied "of its own force." *Kamen* at 1717; *Little Lake Misere* at 594.[7]

In reaching its conclusion that "federal law defines the parameters of section 541(d) of the Bankruptcy Code," the court of appeals was not substantively resolving the choice of law issue, it was merely considering the first prong of the consistently accepted choice of law standard (Pet. App., 47a). As the Third Circuit indicated in citing

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[7]The choice of law issue is actually resolved in the second prong. Some commentators have taken the view that express resolution of the first prong by a court is unnecessary since it has no substantive impact on which law is applied. *See, e.g.,* Field, *Sources of Law: The Scope of Federal Common Law,* 99 Harv. Law Review 883, 950-953; Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U. Law Review 383, 409-410; Mishkin, *The Variousness and Discretion of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U.Pa. Law Review 797, 802-803. Consistent with the view of these commentators, reviewing courts have often ignored any discussion of the first prong and moved directly to the second prong to resolve the choice of law issue. *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *Butner v. United States,* 440 U.S. 48 (1979); *Miree v. Dekalb County,* 433 U.S. 25 (1977). This combining of the prongs is particularly true of lower court decisions concerning this choice of law issue. It also is generally true of all of the circuit court cases addressing the choice of law issue in the context of railroad bankruptcies, including those decisions by the Third Circuit. *See, e.g., In re Iowa Railroad,* 840 F.2d 535 (7th Cir.) *cert. denied* 488 U.S. 708 (1988); *In re Lehigh & New England Railroad,* 657 F.2d 570 (3rd Cir. 1981); *In re Ann Arbor Railroad,* 623 F.2d 480 (6th Cir. 1980).

Kamen, "It is axiomatic that federal law governs questions involving the interpretation of a federal statute" (Pet. App., 47a). Because the Bankruptcy Code is a federal statute, the Court properly concluded that federal law applied and therefore, that it was empowered to determine whether state law should be incorporated or whether federal common law should be applied.

As the Third Circuit stated after reaching its conclusion:

> This, however, is only the beginning of the inquiry. The determination that federal law applies does not inevitably require the application of a uniform federal rule. Applying federal law, courts may either fashion a uniform federal common law rule or adopt state law as the federal rule of decision. *See id; United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 727-728, 99 S.Ct. 1448, 1458 (1979).

Pet. App., 47a-48a.

The Third Circuit's conclusion under the first prong that federal law governs all 11 U.S.C. §541(d) inquiries is in accordance with, and closely follows, the standard historically developed by this Court. Clearly it is not an unprecedented departure as described by the petitioner.[8] As the Third Circuit noted, the fact that this case arises under interpretation of a federal statute, the Bankruptcy Code, is clear and undisputed (Pet. App., 47a).[9]

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[8]The petitioner cites *United States v. Texas,* 113 S.Ct. 1631 (1993), *Texas Industries Inc.* and *Butner* for its contention that the Third Circuit's application of federal law to 11 U.S.C. §541(d) disputes is inconsistent with this Court's prior precedent. None of these cases supports the Petitioner's contention. The *Texas* case merely stands for the proposition that once federal courts establish and apply federal common law, a statute which follows the development of the

(footnote continued on next page)

Furthermore, the Third Circuit's resolution of the first prong is not inconsistent with the decisions of other circuits addressing interpretation of Section 541(d). The fact that the courts in *Iowa R.R.* and *Ann Arbor R.R.* omitted discussion of the first prong and moved directly to discussion of the choice between incorporated state law and federal common law does not result in inconsistent decisions. Both courts implicitly recognized their authority to address the choice between incorporated state law and federal common law, a choice which would be outside the court's power if state law had applied "of its own force." *Kimbell Foods* at 727. In this case, following the consistent and longstanding rule of this Court, the Third Circuit expressly addressed and correctly decided the issue of whether it had the power to address the choice of law prior to substantively resolving the issue through consideration of the second prong.

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federal common law must be interpreted consistent with the common law unless the statute speaks directly to the question addressed by the common law. Although it is not clear in the Court's opinion whether the common law in question was state or federal in origin, review of the justification for the Court's decision reveals that federal common law, not state common law, was at issue. *See West Virginia v. United States*, 479 U.S. 305, 310 (1987). Both the *Texas* and *West Virginia* decisions are expansive interepretations of the application of federal common law and support the State Agencies' position. As indicated previously, *Texas Industries* and *Butner* are cases which do not expressly address the first prong regarding whether federal law applies but move directly to the second prong to substantively resolve the choice of law issue. Accordingly, neither is inconsistent with the Third Circuit's conclusion regarding Section 541(d) disputes, which is merely a resolution of the first prong of the long-established standard.

[9]The State Agencies submit that the application of federal law under the first prong is even clearer in this case because the case arises under both the Bankruptcy Code and the Natural Gas Act and involves two federal programs.

II.

In addressing choice of law issues, once a federal court determines that federal law applies under the first prong, it must then determine whether state law should be incorporated or whether federal common law should be established and applied. *Kimbell Foods* at 727-728. When federal programs "by their nature are and must be uniform in character through the Nation," federal common law must supplant the adoption of state law as the federal rule. *Kimbell Foods* at 728, quoting *United States v. Yazell,* 382 U.S. 341, 354 (1966). No state law "may be applied which would not be wholly in accord with the federal program." *Little Lake Misere* at 604, quoting Mishkin, 105 U.Pa. Law Review at 805-806. The application of federal common law is appropriate when "a single nationwide rule would be preferable to one turning on state law, and the incorporation of state law would not give due regard to the federal interest" in implementing a Congressional statute. *West Virginia* at 310. The application of federal common law is appropriate when federally created substantive rights and obligations are at stake. *Milwaukee v. Illinois,* 45 U.S. 304, 336 (1981).

In addressing this issue, the Third Circuit closely followed the detailed standard expressly identified by the Court in *Kimbell Foods* in evaluating and determining the need for application of federal common law:

> In *Kimbell Foods,* the Supreme Court outlined the analysis that determines whether uniform federal common law or state law should apply. The determination depends on the nature and importance of the government interest at issue and the effect of applying state law. *Kimbell Foods,* 440 U.S. at 727-28, 99

> S.Ct. at 1458. To decide whether a national federal rule is necessary, courts should consider: (1) the need for a nationally uniform law; (2) whether incorporation of state law would frustrate specific objectives of the federal program at issue; and (3) the extent to which application of a federal common law rule would upset commercial expectations that state law would govern. *See id* at 728-29, 99 S.Ct. at 1458-59; *Adams v. Madison Realty & Dev. Inc.*, 937 F.2d 845, 856 (3d Cir. 1991). Developing a federal common law rule is the exception rather than the rule. Federal law should coincide with the relevant state law unless state law would undermine the objectives of the federal statutory scheme and there is a distinct need for nationwide legal standards. *See Kimbell Foods*, 440 U.S. at 728, 99 S.Ct. at 1458.

Pet. App., 48a.

The Third Circuit concluded that the property rights in refunds created by a federal agency, FERC, under express authority of the Natural Gas Act, to cure the unjust and unreasonable rates of a bankrupt interstate natural gas pipeline were governed by federal common law. The decision resulted from a very careful application of the *Kimbell Foods* standards to the unique facts before it. The facts before the Third Circuit, and now before this Court, are truly unprecedented. Never before in United States history has a FERC regulated interstate pipeline governed by the Natural Gas Act filed for bankruptcy. Considering this factor alone, the State Agencies believe that there can not be a conflict between circuits regarding the choice between federal common law and state law. No other circuit has ever reviewed, much less inconsistently

decided, the application of this Court's well-recognized standards to the need for uniformity to fulfill the objectives of the particular federal program at issue here.

The petitioner asserts that the Third Circuit's decision is inconsistent with railroad bankruptcy cases in the Seventh and Sixth Circuits and should be reviewed by this Court as a result. The petitioner's argument fails since these cases evaluate the choice of law issue as it relates to a completely different federal program with completely different needs for uniformity and objectives. In its most favorable light, the petitioner's argument can only stand for the proposition that in applying the choice of law standard in prior cases addressing bankrupt railroads subject to a federal program created by the Interstate Commerce Act, the Third Circuit reached a different result than another circuit with respect to application of the choice of law standard to the same federal railroad program. While these arguments might have been relevant to certiorari review in those cases, they clearly are not relevant here.[10]

Historically, in 1973 and 1981 respectively, the Third Circuit determined that federal common law applied to cases addressing the issue of whether funds collected and

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[10]Although the petitioner's arguments may have been relevant in the earlier railroad cases, they were not successful when made by past litigants. The petition relies primarily on *Iowa Railroad*, a Seventh Circuit decision creating an alleged inconsistency of application of choice of law standards with *Penn Central* and *Lehigh*, the prior Third Circuit railroad cases. Faced with this alleged conflict between circuits, this Court denied certiorari at 488 U.S. 899 (1988). On pages 13-14 of the petition, an attempt is made to explain this Court's decision not to resolve the alleged circuit split in 1988 and to show why circumstances have changed. However, the arguments cannot be considered convincing since the application of choice of law standards in this case is to a completely different federal program.

held by a bankrupt interline railroad for participating railroads were held in trust. *Penn Central; Lehigh.* In *Lehigh,* the Third Circuit expressly considered whether the application of federal common law was appropriate and after careful review of this Court's precedent determined that the need for uniformity and the objectives of the Interstate Commerce Act required application of federal common law.[11]

Subsequently in *Iowa Railroad,* in a case relied on heavily by petitioner, the Seventh Circuit addressed a similar situation concerning a railroad bankruptcy. Although the result reached by the Seventh Circuit to incorporate state law as the federal rule rather than apply federal common law was different, the standard applied to determine whether federal common law should apply is the same. Like the Third Circuit in *Lehigh,* the Seventh Circuit examined whether there was a need for uniformity and whether application of state law disturbed the objectives of the federal program under the Interstate Commerce Act.[12]

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[11]Although the petitioner appears to assert on pages 8-9 of its petition that the Third Circuit's railroad decisions are inconsistent with the Sixth Circuit's railroad decisions, it admits on page 12, f. 12 of its petition that the Sixth Circuit essentially adopted the *Lehigh* analysis in *Ann Arbor R.R.* Subsequently, in *Missouri Pacific Railroad Company v. Esconola and Lake Superior Railroad Company,* 897 F.2d 210 (6th Cir. 1990), the Sixth Circuit expressly adopted the Third Circuit's view.

[12]It is noteworthy that although the Seventh Circuit reached a different result in *Iowa Railroad* than the Third Circuit did in *Penn Central,* the Seventh Circuit did not reject *Penn Central* but expressly distinguished the case on the fact that the railroad in *Iowa Railroad* had not been participating in the national uniform accounting system like the railroad in *Penn Central.* Given the *Penn Central* facts, the Seventh Circuit would have decided the same as the Third Circuit. 540 F.2d at 544. Accordingly, the Sixth Circuit's conclusion in *Missouri Pacific* that the Seventh Circuit Court expressly intended to reject *Penn Central* is mistaken.

There is no inconsistency between the circuits in determination of the standard to be applied to resolve the choice of law issue. The fact that there may have been some disagreement between the circuits on the result of applying that standard to a federal program under the purview of the Interstate Commerce Act does not support certiorari here. As expressly recognized by the Third Circuit, there is an even greater federal interest in this case than in the railroad case (Pet. App., 51a-52a). Accordingly, the petitioner's argument cannot support its conclusion that the circuits are divided. Given the same facts and the same federal program established under the Natural Gas Act, there is no evidence that the Seventh Circuit would not conclude that the application of federal common law is appropriate.

While factual similarities between the railroad cases and this case can be identified, the facts of this case and the underlying federal program beg even more forcefully for application of federal common law. While in the railroad case, the fiscal obligations were established by generally accepted industry standards and did not involve the establishment of rates for service, in this case the refund obligations are established by FERC orders expressly issued to assure just and reasonable rates for natural gas. These orders are issued pursuant to express authority of 15 U.S.C. §717(e) and are in furtherance of, and are necessary to carry out, the just and reasonable rate doctrine, the primary Congressional objective of the Natural Gas Act. *Federal Power Commission v. Hope Natural Gas Company,* 320 U.S. 591, 612 (1944).

Unlike the railroad cases, gas pipelines are subject to orders of the FERC requiring them to "flow through" the refunds to gas distribution company customers, again in

furtherance of Congressional objectives. Like the railroad in *Penn Central,* but unlike the railroad in *Iowa R.R.*, the funds at issue are subject to uniform accounting procedures. However, unlike *Penn Central,* where the railroad's accounting procedures were governed by industry guidelines, here the accounting procedures followed by Columbia are mandated by federal law. 18 CFR, Parts 150-179. Finally, this Court has indicated that uniformity of regulation of the operations of interstate pipelines, the most important factor in the choice of law standard, is a Congressional objective of the federal program at issue here established under the Natural Gas Act. *Schneidewind v. ANR Pipeline Company,* 485 U.S. 293, 310 (1988); *Northern Natural Gas Company v. State Corporation Commission of Kansas,* 372 U.S. 84, 91-92 (1963).

The Third Circuit's decision below as to choice of law is correct. Incorporation of state trust law as the federal rule would result in Columbia charging illegal rates under 15 U.S.C. §717c(a), being in violation of FERC orders and would otherwise frustrate all of the objectives of the Natural Gas Act (Pet. App., 50a). Faced with these circumstances, it is clear that the Seventh Circuit, if given the opportunity, would also conclude that the application of federal common law is required and that under that law the refunds at issue are held in trust by Columbia. There is no inconsistency between the circuits. Indeed, there can be no inconsistency. No other circuit has had the opportunity to review the application of choice of law principles to the federal program established by the Natural Gas Act.

2. The Third Circuit's Application of Federal Common Law Does Not Create Important and Unresolved Problems.

The Third Circuit's application of federal common law and resulting holding that the refunds at issue are held in trust for Columbia's downstream customers does not create important or unresolved problems which would warrant this Court's review. The petitioner attempts to attract this Court's attention with unsupported statements that the commercial expectations of creditors of interstate pipelines would be upset by the application of federal common law, a view expressly rejected by the Third Circuit (Pet. App., 50a-51a).

The petitioner's theory presumes that lenders considered the availability of FERC-ordered refunds in the case of bankruptcy in evaluating credit arrangements with interstate gas pipelines including Columbia. This presumption is clearly not supportable. The service contracts between Columbia and its customers, the form of which must be approved by FERC, each contained express reference to the application and incorporation of FERC regulations and orders. All of the refunds received by interstate gas pipelines, like Columbia, are or will be subject to FERC orders which expressly direct the pipeline to "flow through" the refunds downstream. The service contracts, and FERC orders and regulations expressly adopted by the contracts, made it abundantly clear to any potential lender that it could not have reasonably relied on or expected that a pipeline had an equitable interest in refunds which could be asserted by creditors in the case of bankruptcy.[13]

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[13]The petitioner boldly states that "it is undisputed that there were no contractual expressions of intent to create a fiduciary trust relationship" (Pet., pages 5-6, f. 5). The State Agencies strongly disagree.

In fact, there were never any commercial expectations that FERC ordered refunds would be available to creditors in the case of a pipeline bankruptcy. The State Agencies submit that producers, pipelines, distribution companies and lenders were all well aware that FERC ordered refunds are and have always been the property of the gas consuming public for whose benefit they are created.[14] *Texas Eastern Transmission Corporation v. Federal Power Commission,* 414 F.2d 344, 346-347, 350 (5th Cir. 1968). Accordingly, these alleged commercial expectations are a product of the creative legal arguments of the petitioner, not commercial reality.

Nor does the fact that the Internal Revenue Service (IRS) has a tax claim against Columbia's bankruptcy estate constitute an important issue which warrants this Court's review (Pet., pages 10-11, f. 10). The United States, through the IRS, is a creditor in most bankruptcies. To adopt the petitioner's argument would require this Court to review every lower court decision which directly or indirectly affected the government's bankruptcy claim.

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[14]The petitioner argues that until FERC's amicus brief to the Third Circuit which expressed its position that neither Columbia or any other interstate gas pipeline had an equitable interest in FERC ordered refunds under the Natural Gas Act, FERC had historically viewed refunds as yielding unsecured claims in bankruptcy (Pet., pages 10-11 f. 10). This position is insupportable and is inconsistent with the thousands of FERC orders under the Natural Gas Act which require pipelines to "flow through" refunds downstream. The case cited by petitioner in support of its position, *Transamerica Natural Gas Corporation,* 41 FERC ¶62,206 (1987), is a case involving butane gas and involved refunds ordered by FERC under authority of the Natural Gas Policy Act, 15 U.S.C. §§3301, *et seq.* not the Natural Gas Act. The Natural Gas Policy Act addresses the pricing of gas production not gas transportation and distribution and is designed to achieve very different Congressional objectives. Furthermore, Transamerica is a producer and is at the beginning of the natural gas continuum. There is no entity upstream from Transamerica from whom it could receive refunds for the purpose of "flow through" to a downstream beneficiary.

Furthermore, in this case, the only position taken by the United States government before the Third Circuit was the amicus position of FERC which strongly supported the Third Circuit's application of federal common law to this case.

Finally, the petitioner attempts to convince this Court that the application of federal common law by the Third Circuit is inconsistent with the public interest because it will increase the cost of capital for interstate pipelines, costs which might ultimately be passed on to gas consumers. Again, this argument is based on the unsupported presumption that commercial expectations are so affected by the Third Circuit's decision that prospective lenders will increase interest rates to interstate pipelines. This presumption is also a self-serving creation of the petitioner and does not reflect commercial reality.

The State Agencies and FERC are the only parties to these proceedings which are qualified to assess the effect of the Third Circuit's decision on the public interest. In fact, the State Agencies appear before this Honorable Court pursuant to authority delegated by their respective state legislatures to protect the public interest.

The expectations of the State Agencies, as well as the expectations of our constituents, the gas consuming public, are to rely on the nationwide ratemaking system established by the Natural Gas Act. Those expectations and the requirements of the Act would be frustrated if the refunds at issue were not authorized to flow through Columbia, and subsequently through gas distribution companies regulated by state public utility commissions, to their rightful owners. If expectations are to be considered by this Court, they should be the expectations of those

consumers that rely on the government to enforce statutorily required just and reasonable rates for natural gas and not the alleged self-serving expectations of the corporations represented by the petitioner.

CONCLUSION

The State Agencies respectfully request this Honorable Court to deny certiorari in this matter.

Respectfully submitted,

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